Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
CLERK

81-2221

No. ____

IN THE

# Supreme Court of the United States

October Term, 1982

JAMES M. RUTLEDGE,
*Petitioner,*

*vs.*

SMALL BUSINESS ADMINISTRATION
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Edward B. Cloutman, III

MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
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Dallas, Texas 75247
(214) 630-3672

*Counsel for Petitioner*

## QUESTIONS PRESENTED

1.

May a United States District Court grant a defendant summary judgment against a *pro se* Plaintiff in a civil rights action raising factual and legal issues of racial discrimination in the awarding of assistance and/or funding to small businesses, particularly where factual issues were explicit and implicit in all contentions of racial discrimination?

2.

Whether a United States District Court may treat the administrative actions of a United States agency as those only requiring substantial evidence review, or must it grant a trial *de novo* on all issues raised by an action alleging racial discrimination in services by a governmental agency?

## LIST OF PARTIES

James M. Rutledge.

Small Business Administration.

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No. ____

IN THE

# Supreme Court of the United States

October Term, 1982

JAMES M. RUTLEDGE,

*Petitioner,*

*vs.*

SMALL BUSINESS ADMINISTRATION

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, a small businessman in Dallas, Texas, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 29, 1982;[1] rehearing and rehearing *en banc* denied March 5, 1982[2] and mailed to Petitioner on March 15, 1982.[3]

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported. It is reproduced in the appendix hereto (App. p. 11). The opinion of the Dis-

[1]Appendix, p. 11.

[2]Appendix, pp. 12-13.

[3]Appendix pp. 14-15.

trict Court for the Northern District of Texas rendered May 13, 1981, is also unreported and is reproduced in the appendix hereto (App. pp. 3-6, together with other unreported miscellaneous orders of the Court dated May 13, 1981 and May 18, 1981 (App. pp. 7-9).

## JURISDICTION

The judgment of the Court of Appeals was rendered on January 29, 1982. Rehearing and rehearing *en banc* were denied on March 5, 1982, but not communicated to Petitioner until March 15, 1982 [see letter of Gilbert F. Ganacheau, Clerk, by H. E. Adams, Jr., Deputy Clerk, dated March 15, 1982 (App. pp. 14-15)]. This Court's jurisdiction is involved pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS

The Civil Rights Act of 1866, 42 U.S.C. §1981, coupled with 28 U.S.C. §1343(4), was invoked as the basis for Petitioner's action below. There are reproduced in their entirety in the appendix hereto (App. pp. 16-17). Petitioner in the court of appeals has also relied upon 42 U.S.C. §2000d, 15 U.S.C. §§631, 634, 636 and 637, all sections of the Small Business Act (as amended), together with Executive Order No. 11625 relative thereto.

## STATEMENT OF THE CASE

Petitioner brought this action originally pursuant to 42 U.S.C. §1981 and 28 U.S.C. §1343(4) in the United States District Court for the North-

ern District of Texas contending that Respondent's denial to him of financial assistance in connection with his business enterprises in Dallas, Texas, was the result of racial discrimination. Petitioner filed his original complaint *pro se* and proceeded in both the trial court and court of appeals without counsel. Petitioner's Amended Complaint was filed February 27, 1981. It is upon this amended complaint that the Court granted summary judgment at the behest of Respondent. Petitioner also filed a pleading entitled, "Plaintiff's Statements of Undisputed Facts" in connection with the Respondent's application for summary judgment. This pleading, as its title suggests, set forth Petitioner's contentions of both the factual and legal nature relative to his complaints against Respondent.

Premised upon Petitioner's filing of his Statement of Undisputed Facts and because Petitioner was a *pro se* litigant, the trial court reconsidered its Order of March 9, 1981 which granted summary judgment in favor of the Respondent and treated the above pleading, together with a Notice of Appeal as a request by Petitioner for a new trial. The district court, on May 13, 1981, entered a memorandum order reaffirming its March 9, 1981 order directing summary judgment and denying Petitioner' request for "new trial" (App. pp. 3-6). The district court reiterated its award of summary judgment to Respondent on May 18, 1981, (App. pp. 7-9) and ordered that Petitioner's earlier notice of appeal be considered timely filed for purposes of the Court's May 13,

1981 award of summary judgment to Respondent.

Plaintiff proceeded on appeals *pro se*. Petitioner's Application for Appointment of Counsel by the United States Court of Appeals for the Fifth Circuit was denied on August 7, 1981, a copy of which was filed with the District Court on August 10, 1981 (App. p. 10). Thereafter, Petitioner filed a brief in support of his claims, again describing the factual issues in need of resolution by the district Court. Petitioner further emphasized the unresolved factual contentions in his reply brief, also filed with the Court of Appeals for the Fifth Circuit. Nonetheless, on January 29, 1982, the Court of Appeals affirmed *per curium* and without opinion the ruling the trial court below (App. p. 11).

Petitioner moved for rehearing and/or for rehearing *en banc*, but same was denied by order of the United States Court of Appeals for the Fifth Circuit on March 5, 1982, a copy of which was transmitted to the Petitioner by cover letter dated March 15, 1982 (App. pp. 14-15).

## REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with decisions of other circuits as noted *infra* and presents questions of major importance relative to summary disposition of civil rights claims.

## ARGUMENT

Petitioner submits that the district court, as well as the court of appeals, erred as a matter of law in the awarding of summary judgment based upon the allegations of his Amended Complaint, his Statement of Undisputed Issues and the case law controlling the award of summary judgment pursuant to Rule 56, Federal Rules of Civil procedure.

Since this Court's decision in *United States v. Diebold*, 369 U.S. 654, 655 (1962), the clear rule has been that summary judgment shall not be granted unless no material fact is in dispute and inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Circuit courts have interpreted *Diebold* in various and sundry fashions, but all stand for the proposition that (1) a trial court may not make findings regarding disputed facts, premised upon a motion for summary judgment, and (2) that the burden of demonstrating that no genuine issue of material facts exists rests with the movant. The movant's papers are to be closely scruitinized while those of the Petitioner (in this case) should have been viewed indulgently. *Smith v. Hudson*, 600 F.2d 60, 63-64 (6th Cir. 1979), cert. dismissed 444 U.S. 986 (1979). See also *Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc.*, 630 F.2d 1155, 1158 (6th Cir. 1980). Further, it seems clear that in addition to resolving all doubts against the movant for summary judgment, the district court should

not assess the probative value of any evidence nor resolve factual issues without the benefit of the truth seeking procedures or trial. See *Southern Distributing Co., Inc. v. Southdown, Inc.*, 574 F.2d 824, 826 (5th Cir. 1978). And, *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977).[4]

Notwithstanding the controlling authority, the district court in its March 9, 1981 and May 13, 1981 award of summary judgment to respondent resolved the ultimate fact issue in dispute of whether Respondent treated Petitioner's application for financial assistance differently because of race, and whether it had treated other black applicants for financial assistance in a similarly disparate fashion.

The district court analyzed Petitioner's Statement of Undisputed Facts, but nowhere resolves Plaintiff's contention that race became a factor in his treatment through the processing of his application for financial assistance. Petitioner notes several inconsistent actions by Respondent in the processing of his application, which of course are denied by Respondent. An indulgent consideration of Petitioner's statement of his contentions would lead one to a reasonable conclusion that racial bias was asserted to exist as an integral part of the

---

[4]Other circuits follow the above-stated principals. See, e.g., *Chaudhry v. Jenkins*, 559 F.2d 1085, 1088-1091 (7th Cir. 1977); *Rosenthal v. Rizzo*, 555 F.2d 390, 392-393 (3rd Cir. 1977); *Rivera Morales v. Benitez de Rexach*, 541 F.2d 882, 884-885 (1st Cir. 1976); *United States v. Matheson*, 532 F.2d 809, 813 (2nd Cir. 1976); *Jaulr v. Wilson*, 521 F.2d 724, 729 (8th Cir. 1975); and *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1178 (D.C. Cir. 1974).

decision making process regarding Petitioner's application. This ultimate fact resolution was surely proper for trial on the merits; it was wholly improper for resolution by summary judgment.

Because of the allegations of racial discrimination by Petitioner *pro se* this matter was particularly in appropriate for disposition by summary judgment. The existence of racial bias is often concealed and proven by indirect evidence alone. The concept is frequently subjective in nature. Ultimately, whether racial discrimination crept into the decision making process is a factual resolution, not fitting for decision by summary judgment. See: *Liotta v. National Forge Co.*, 629 F.2d 903 (3rd Cir. 1980), *cert. denied*, ..... U.S. ..... [1981].

## CONCLUSION

This Court has repeatedly indicated its sensitivity to racial discrimination issues, particularly those presented by *pro se* litigants. The summary judgment disposition of Petitioner's complaint should not be coutenanced and for this reason the writ should be granted.

Respectfully submitted,

MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.
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(214) 630-3672

By .....
Edward B. Cloutman, III
*Counsel for Petitioner*

Date: May ....., 1982

No. ____

IN THE

# Supreme Court of the United States

October Term, 1982

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JAMES M. RUTLEDGE,

*Petitioner,*

*vs.*

SMALL BUSINESS ADMINISTRATION

*Respondent.*

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## APPENDIX
## TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*Counsel for Petitioner*

## APPENDIX

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U. S. District Court
Northern District of Texas
FILED
MAY 15, 1981
JOSEPH McELROY JR., Clerk
By C. Littman, Deputy

ITEM 1

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

JAMES M. RUTLEDGE,
*Plaintiff,*

*vs.* CA 3-79-0780-R

SMALL BUSINESS ADMINISTRATION
*Defendant.*

**MEMORANDUM ORDER**

On March 9, 1981, summary judgment was granted in favor of defendant Small Business Administration ("SBA") by the attached Memorandum Opinion and final Order — which found that the *pro se* plaintiff James Rutledge, had failed to allege ply with two Court Orders directing him to allege specific facts in support of his conclusory allegations of racial discrimination under 42 U.S.C. §1981; that the pleadings and affidavits on file had been closely examined with sensitivity to the problems of a *pro se* plaintiff; but that, based upon a careful study of the pleadings and exhaustive affidavits, there was no genuine issue of fact and defendant was entitled to judgment as a matter of law.

On March 13, 1981, the plaintiff filed a "Notice of Appeal," accompanied by "Plaintiff Statements of Undisputed Facts." Because the plaintiff is a

*pro se* litigant, the Court has considered the plaintiff's "Notice of Appeal" as a timely filed Motion for New Trial -- and deems the unsworn "Plaintiff Statements of Undisputed Facts" to have been sworn to by the plaintiff for all purposes. After a careful consideration of this statement of facts, the Court again finds that the plaintiff has failed to raise any genuine fact issue concerning his claim of racial discrimination and that the Motion for New Trial should be denied.

Plaintiff's facts #8-19 assert that the SBA's Office initially sought contract support for his first Section 8(a) application at an amount which it knew at the time was below the level of support then available for a wholesale dealer in the specified paper products; and that his first application was, in fact, not approved because support at this low level was not available under existing procurement requirements.

The affidavits of SBA personnel and the General Services Administration ("GSA") "Solicitation, Offer and Award" forms filed by the plaintiff clearly establish that the plaintiff's company was too small to qualify for a higher level of support. The GSA procurement requirements which were established for awards to small businesses specified that they were applicable to businesses with 750 employees. The plaintiff's application reveals that his company had only one employee. The plaintiff has raised no fact issue in support of his discrimination claim.

Plaintiff's facts #20-22 establish that the plaintiff himself traveled to Washington, D.C. to locate Section 8(a) contract support because he believed the Dallas SBA Office was not diligently searching for support for a paper *dealer* of his type and size; that the plaintiff did in fact locate contract support from GSA for a paper *manufacturing* operation; and that solely as a result of the plaintiff's time and effort, the Dallas SBA Office learned that contract support was available for a paper converting operation. Again, this fails to raise a fact issue in support of a claim of racial discrimination.

It is undisputed that the plaintiff's application which was pending in the Dallas SBA Office at this time requested support for the Nile Papyrus Company, a wholesale *dealer* in paper products *with one* employee. The support which the plaintiff located was for a paper *manufacturer*. Nevertheless, within three days after the Dallas Office learned of possible support for a manufacturer, representatives from that office contacted and met with the plaintiff to discuss the feasibility of the plaintiff's operating a paper converting business.

Plaintiff's facts #23-24 merely establish that in order to assist him in completing the required business plan information to qualify for support as a paper manufacturer, the plaintiff felt he was entitled — at SBA expense — to the services of a private consulting firm other than the two or more consulting firms to whom the SBA paid over $2,000 to assist the plaintiff.

Based on the above, the Court finds that the plaintiff's Motion for New Trial fails to raise any genuine issue of material fact concerning his claim of racial discrimination and, therefore, the Motion is denied.

**Appointment of Counsel**

In its March 9 Opinion, this Court found that the plaintiff's request for appointment of counsel should be denied because the plaintiff's claims lacked sufficient merit. The plaintiff has renewed his request for appointment of counsel.

The Court has carefully considered the merits of the plaintiff's claim in light of the additional facts supplied by the plaintiff in his Motion for New Trial, and remains of the opinion that the "proper exercise of this Court's discretion requires that the request for appointment of counsel be denied" due to the lack of merit of the plaintiff's claim.

SIGNED this 13th day of May, 1981.

JERRY BUCHMEYER
United States District Judge

U. S. District Court
Northern District of Texas
FILED
MAY 13, 1981
JOSEPH McELROY JR., Clerk
By C. Linman, Deputy

ITEM 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES M. RUTLEDGE,
*Plaintiff,*

*vs.* CA 3-79-0780-R

SMALL BUSINESS ADMINISTRATION
*Defendant.*

ORDER

On March 9, 1981, a final Order was entered in this action granting summary judgment in favor of the defendant, Small Business Administration. On March 13, 1981, plaintiff James Rutledge, *pro se,* filed a "Notice of Appeal" from that final Order.

It is hereby ORDERED that the plaintiff's "Notice of Appeal" will be considered by this Court as a Motion for New Trial, timely filed under Rule 59, F.R.C.P., but that this Motion for New Trial is denied, in accordance with the attached Memorandum Opinion.

SIGNED this 13th day of May, 1981.

JERRY BUCHMEYER
United States District Judge

U. S. District Court
Northern District of Texas
FILED
MAY 18, 1981
JOSEPH McELROY JR., Clerk
By C. Littman, Deputy

ITEM 3

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

JAMES M. RUTLEDGE,
*Plaintiff,*

*vs.* CA 3-79-0780-R

SMALL BUSINESS ADMINISTRATION
*Defendant.*

**ORDER**

On March 13, 1981, plaintiff James Rutledge, *pro se,* filed a "Notice of Appeal" from this Court's final order of March 9, 1981, granting summary judgment in favor of defendant Small Business Administration. On May 13, 1981, it was ordered that the plaintiff's "Notice of Appeal" was being considered as a timely filed Motion for New Trial, but that the Motion was denied.

Being sensitive to the problems faced by *pro se* litigants, it is hereby ORDERED that the "Notice of Appeal" filed by plaintiff on March 13, 1981, and considered by this Court on May 13, 1981, as a Motion for New Trial shall now be considered as a timely filed "Notice of Appeal" from the final order entered March 9, 1981, and from the May 13, 1981, order denying the Motion for New Trial.

It is further ORDERED that the plaintiff's re-

quest to proceed *in forma pauperis* on appeal be referred to the United States Magistrate for his findings and recommendations.

SIGNED this 18th day of May, 1981.

JERRY BUCHMEYER
United States District Judge

U. S. Court of Appeals
FILED
AUG. - 7, 1981
Gilbert F. Ganucheau, Clerk

ITEM 4

U. S. District Court
Northern District of Texas
FILED
AUG. 10, 1981
Joseph McElroy, Jr., Clerk
By S. Smith, Deputy

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**UNIT A**

**No. 81-1145** **DOCKETED**

JAMES M. RUTLEDGE,
*Plaintiff,*

*vs.* CA 3-79-0780-R

SMALL BUSINESS AAMISTRATION
*Defendant.*

**On Application for Leave to Appeal in Forma Pauperis and On Application for Appointment of Counsel**

ORDER:

IT IS ORDERED that petitioner's pro se application for leave to appeal in forma pauperis is denied.

IT IS FURTHER ORDERED that petitioner's pro se application for appointment of counsel to represent him on his appeal is denied.

THURMAN GIBBS, JR.
United States Circuit Judge

A true copy
Test Gilbert F. Ganucheau
Clerk, U.S. Court of Appeals, Fifth Circuit
By Susan Vaughn, Deputy
New Orleans, Louisiana

ITEM 5

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1145
Summary Calendar

DO NOT PUBLISH

JAMES M. RUTLEDGE,
*Plaintiff-Appellant,*

*versus*

SMALL BUSINESS ADMINISTRATION
*Defendant-Appelee.*

Appeal from the United States District Court for the Northern District of Texas

JANUARY 29, 1982

Before GEE, GARZA and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

Northern District of Texas
FILED
MAY 13, 1981
JOSEPH McELROY JR., Clerk
By C. Litman, Deputy

ITEM 6

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 81-1145**

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JAMES M. RUTLEDGE,
*Plaintiff-Appellant,*

*versus*

SMALL BUSINESS ADMINISTRATION
*Defendant-Appelee.*

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**Appeal from the United States District Court for the Northern District of Texas**

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**ON SUGGESTION FOR REHEARING EN BANC**
**(Opinion 01-29-82, 5 Cir., 198_, ____ F.2d ____).**
**(March 5, 1982)**

Before GEE, GARZA and TATE, Circuit Judges.
PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

THURMAN GIBBS, JR.
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

ITEM 7

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**
**Office of the Clerk**

March 15 1982

Mr. Joseph McElroy, Jr.
Clerk
United States District Court
for the Northern District of Texas
1100 Commerce Street, Room 15C22
Dallas, TX 75242

No. 81-1145 — James M. Rutledge
-vs- Small Business Administration
(D.C. No. CA-3-79-0780-R)

☐ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☒ Enclosed to you only is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☐ Copy of the Court's opinion.

☒ Original record on appeal or review. (1 Volume)

☐ Original exhibits.

☐ Bill of Costs approved by this Court.

☐ Copy enclosed to counsel.

Sincerely,

GILBERT F. GANUCHEAU, Clerk
By: H. E. Adams, Jr.
Deputy Clerk

cc: (Letter Only)
Mr. James M. Rutledge √
Mr. Stafford Hutchinson

## ITEM 8

**28 U.S.C. § 1343. Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrong mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

## ITEM 9

**42 U.S.C. § 1981. Equal rights under the law**

All persons within the jurisdiciton of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

Office - Supreme Court, U.S.
FILED
OCT 15 1982
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CLERK

No. 81-2221

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. RUTLEDGE, PETITIONER

*v.*

SMALL BUSINESS ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 81-2221

JAMES M. RUTLEDGE, PETITIONER

*v.*

SMALL BUSINESS ADMINISTRATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

Petitioner contends that the court of appeals erred in affirming an order of the district court granting summary judgment for respondent Small Business Administration (SBA) in a suit in which petitioner claimed that the SBA's denial of assistance to petitioner's business constituted racial discrimination.[1] Summary judgment was appropriate, however, because petitioner has never raised any factual issues to support his claim of discrimination.

---

[1]The summary affirmance of the court of appeals (Pet. App. 11) is reported at 669 F. 2d 732, and the denial of rehearing en banc (Pet. App. 12-13) is reported at 671 F. 2d 1380. The district court's initial opinion (App., *infra*, 1a-5a) and its denial of a motion for a new trial (Pet. App. 3-6) are not reported.

1. Petitioner, appearing *pro se* in the courts below,[2] is a black male doing business as "Nile Papyrus Company." He initially applied to the SBA for assistance under the Section 8(a) program[3] as a *distributor* of paper products (App., *infra*, 3a). Petitioner's initial application of September 15, 1976, was rejected because the Dallas SBA officer learned that there were no government contracts suited to petitioner's kind of business (*ibid.*). Petitioner's second application, submitted on July 12, 1977, was not processed because the SBA Administrator had imposed a nationwide moratorium on the processing of Section 8(a) applications (App., *infra*, 3a). Nonetheless, in August 1977, during the moratorium, the SBA learned of possible contract support for a paper *conversion* business and discussed with petitioner the feasibility of his operating such a business (*id.* at 3a-4a). Petitioner's third application, submitted in November 1977, after the moratorium had been lifted, sought assistance as a paper conversion business. Petitioner received preliminary approval and was told to submit the required business plan information, but he never did so (*id.* at 4a). Hence, a completed application was never submitted to the SBA (*ibid.*).

---

[2]An attorney did attempt to assist petitioner in his dealing with the SBA but chose not to represent him in the district court (App., *infra*, 5a).

[3]The Section 8(a) program, which offers assistance to minority businesses to help them become competitive, derives its popular name from its source in Section 8(a) of the Small Business Act, as amended, 15 U.S.C. (Supp. IV) 637(a). There are two stages in obtaining Section 8(a) assistance: (1) the SBA determines that the applicant owns a disadvantaged small business; and (2) the SBA ascertains whether there are possible government contracts matching the applicant's type of business. When the SBA locates such contracts, the applicant submits additional information, including detailed financial, management and technical information concerning the business, prior to final SBA approval (App., *infra*, 2a-3a).

From January 1978 through June 1979, the SBA made numerous inquiries in the paper converting industry in order to supply petitioner with the necessary information, and the SBA even located a source for the equipment petitioner would need to set up a conversion facility (App., *infra*, 4a). The SBA assigned a business adviser to assist petitioner in submitting the required information and paid more than $2,000 to outside business consultants who attempted to assist him (*id.* at 4a). The consultants' reports concluded that petitioner lacked the necessary business and technical expertise and economic resources to operate a paper converting business (*ibid.*).

Based upon these facts, the district court found that "the unsupported conclusions alleged by the [petitioner] do not raise any fact issue of racial discrimination" (App., *infra*, 5a). Accordingly, the court granted the government's motion for summary judgment (*ibid.*).

On May 13, 1981, the district court, in response to petitioner's "Notice of Appeal" and "Statements of Undisputed Facts," issued an order again concluding that there was no genuine issue of fact and that the SBA was entitled to judgment as a matter of law (Pet. App. 3-6). With respect to petitioner's allegation that the SBA initially sought contract support at an amount it knew to be below the level of support available to his type of business, the court noted that the procurement requirements established by the General Services Administration (GSA) for awards to small businesses specified that they applied only to businesses with 750 or more employees; petitioner's company had only one employee (*id.* at 4). Petitioner alleged that he travelled to Washington, D.C., because he felt the Dallas SBA office was insufficiently diligent in locating support for a paper *dealer* such as himself, and that only through his efforts did

he learn of GSA support for a paper *manufacturing* operation and did the SBA learn of support for a paper *conversion* operation. The district court concluded: "Again, this fails to raise a fact issue in support of a claim of racial discrimination" (*id.* at 5).[4] The remaining allegations, as the court found, "merely establish that in order to assist him in completing the required business plan information * * *, [petitioner] felt he was entitled—at SBA expense—to the services of a private consulting firm other than the two or more consulting firms to whom the SBA paid over $2,000 to assist the [petitioner]" (*ibid.*). The court, treating petitioner's submission as a motion for a new trial, denied the motion.

2. Petitioner's allegations of racial discrimination are wholly conclusory and are not supported by any alleged facts. The record reveals only the SBA's unstinting attempts to help petitioner qualify for Section 8(a) assistance. This included making suggestions as to how petitioner could alter his operation in order to gain contract support and expending more than $2,000 for outside business consultants. After carefully reviewing every factual allegation and duly noting the special position of a *pro se* litigant attempting to establish a case of racial discrimination, the district court concluded that under the facts alleged no discrimination had occurred. Petitioner's failure to obtain Section 8(a) assistance was entirely due to his own failure to submit the required information regarding his business. Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate

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[4]The court added that within three days of the SBA's learning of the support for a manufacturer, SBA representatives met with petitioner to discuss the possibility of his operating a paper converting business (Pet. App. 5).

where, as here, no genuine issue exists as to any material fact. See, *e.g.*, *Agosto* v. *INS*, 436 U.S. 748, 754 (1978); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

OCTOBER 1982

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[5]For the same reasons, petitioner's claim (Pet. i) that the district court employed an excessively deferential "substantial evidence" standard of review of the SBA's actions is completely without merit.

DOJ-1982-10

# APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

**FILED:**
**MAR. 9 1981**

**JOSEPH McELROY, JR., CLERK**

**BY_____**
**Deputy**

| | | |
|---|---|---|
| JAMES M. RUTLEDGE, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| VS. | ) | CA 3-79-0780-R |
| | ) | |
| SMALL BUSINESS ADMINISTRATION, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION**

This is a racial discrimination case brought under 42 U.S.C. § 1981 by plaintiff James Rutledge, *pro se*, against the Small Business Administration (SBA). The plaintiff claims that he was denied contract assistance for his business under the SBA's Section 8(a) program because of his race.

Although he was ordered twice by the Court to file an Amended Complaint stating the specific nature of his claim, the plaintiff has failed to do so, and his pleadings do not state *any facts* which support his conclusory allegations of racial discrimination. Defendant SBA filed its Motion for

Summary Judgment, and the plaintiff has responded by expressly refusing to address the facts set forth as undisputed in the defendant's motion and supporting affidavits. Based on the pleadings and affidavits filed herein—which the Court has closely examined because it must be sensitive to the problems faced by *pro se* litigants—the Court finds that there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law.

**SOVEREIGN IMMUNITY**

The plaintiff's complaint purports to seek injunctive and declaratory relief as well as damages. This Court has no authority to grant injunctive relief against the SBA. The SBA's waiver of sovereign immunity, codified at 15 U.S.C. § 634(b)(1), does not extend to the issuance of an injunction against the Administrator. *Expedient Services, Inc.* v. *Weaver*, 614 F. 2d 56 (5th Cir. 1980).

The plaintiff's complaint also seeks declaratory relief and contains a general prayer for damages. Although no specific damage is alleged and no specific amount is claimed, the SBA concedes that its sovereign immunity is waived to the extent that the plaintiff may claim monetary damages under 42 U.S.C. § 1981.

**PLAINTIFF'S CLAIM**

The plaintiff, a black male, claims that the SBA discriminated against him on the basis of his race by failing to give final approval to his applications for assistance under the SBA's Section 8(a) program. This program authorizes the SBA to award government contracts to disadvantaged small businesses to enable them to become competitive.

The application procedure for a small business desiring Section 8(a) assistance consists of two stages. First, the applicant supplies preliminary information on SBA forms

which are used to determine if the applicant owns or controls a disadvantaged small business. Based on this information, the SBA attempts to locate possible government contracts which match the applicant's type of business. If they are, the applicant is notified that he has satisfied the preliminary eligibility requirements—and that he must submit additional materials, including detailed financial, management and technical information regarding his business. From this information, the SBA determines whether the applicant may be given final approval for contract assistance.

The detailed affidavits of SBA personnel establish, beyond doubt, that the plaintiff's failure to obtain Section 8(a) assistance *was not* the result of discriminatory actions of the SBA—and that, in fact, the SBA expended considerable time, effort and money to help the plaintiff obtain final approval.

The plaintiff initially applied for Section 8(a) assistance as a distributor of paper products. His first application was submitted on September 15, 1976, and consisted only of the information necessary to establish his preliminary eligibility as the owner of a disadvantaged small business. The only reason that this application was not approved was because the Dallas SBA office was notified that there was no possible government needs which could be satisfied by a business of the plaintiff's type and size—a small distributor of paper products.

The plaintiff's second application, submitted on July 12, 1977, was not processed due to the Administrator's imposition of a national moratorium on the processing of all Section 8(a) applications. Nevertheless, SBA personnel continued their efforts to help the plaintiff. In August of 1977, while the moratorium was still in effect, the Dallas

office learned of possible contract support for a paper conversion business and met with the plaintiff to discuss the possibility of the plaintiff's operating as a paper converter.

The plaintiff's third application was submitted in November of 1977 after the moratorium was lifted, and it sought assistance for a paper converting business. In December, the plaintiff was told to begin preparing the financial, management and technical information necessary for the SBA to determine his final eligibility. In January of 1978 he was given preliminary approval and told to submit the required business plan information.

From January 1978 through June 1979, the Dallas SBA office expended substantial amounts of time, effort and money to assist the plaintiff in obtaining final approval under the Section 8(a) program. SBA personnel made inquiries of persons in the paper converting industry to supply plaintiff with information about such operations—and even located a source for the equipment which the plaintiff would need to set up a conversion facility. Not only was an SBA business adviser assigned to assist the plaintiff in submitting the required business plan information, but the *SBA also paid over $2,000 to outside business consultants who attempted to assist the plaintiff.*

In spite of repeated requests from the SBA and the business consultants during this 18 month period, the plaintiff failed to supply the needed business plan information and a completed application was never submitted to the SBA. The consultants' reports ultimately concluded that the plaintiff lacked the necessary business and technical expertise and economic resources to operate a paper converting business.

Based on these undisputed facts, the Court finds that the SBA did not discriminate against the plaintiff due to his race or otherwise.

**REQUEST FOR APPOINTMENT OF ATTORNEY**

The plaintiff has requested the appointment of an attorney to represent him. Some of the material filed by the plaintiff shows that an attorney (Sam Biscoe) did attempt to assist plaintiff with the SBA, but chose not to represent him in this suit. In addition, since the plaintiff's claims are without merit, the proper exercise of this Court's discretion requires that the request for appointment of counsel be denied. Cf. *Caston* v. *Sears, Roebuck & Co.*, 556 F. 2d 1305, 1308-10 (5th Cir. 1977).

**CONCLUSION**

The plaintiff is understandably upset because he did not receive the SBA contract assistance under the Section 8(a) program. This feeling, and the unsupported conclusions alleged by the plaintiff, do not raise any fact issue of racial discrimination. Accordingly, a final order dismissing this case will be entered in accordance with this Memorandum Opinion.

SIGNED this 9th day of March, 1981.

/s/ JERRY BUCHMEYER

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER